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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

BARBARA A. JAGIELLO, Plaintiff and Respondent, v. SUSAN E. CHRISTMAN, Defendant and Appellant.	A135098 (San Francisco County Super. Ct. No. CGC-10-501833)

Defendant Susan Christman appeals from the order disqualifying her husband, Attorney John Mounier, from representing her in an action against her former counsel Barbara Jagiello. We affirm.

BACKGROUND

Jagiello was retained by Christman and two of her siblings to represent them against a third sibling in a dispute concerning disposition of family assets by an impaired matriarch. The matter was filed in Sacramento County and was settled following mediation by a retired judge. Jagiello subsequently sued Christman for breach of the engagement agreement and failure to pay for services rendered.

Christman responded with a cross-complaint claiming that, in addition to breaching their contract, Jagiello was violating the Unfair Competition Law (Bus. & Prof. Code, § 17200) by charging "unreasonable, fraudulent and unconscionable fees," and seeking "disgorgement" of the amounts she had paid to Jagiello. Christman was represented by Mounier.

Jagiello moved to disqualify Mounier because he had drafted the "Representation Agreement" between Christman and Jagiello that was the basis of the complaint and cross-complaint, and when doing so "was acting on behalf of Barbara Jagiello." In addition, Mounier "collected, and transmitted, the only sum which Christman paid to Barbara Jagiello for services, a check for $1,700." Finally, Jagiello stated in her supporting declaration that it was Mounier who "contacted me as to litigation to be brought on behalf of his wife Susan Christman and her two siblings against their brother."

Among the five exhibits attached to Jagiello's declaration was the agreement between her and Christman headed "Law Office of Barbara A. Jagiello." On August 2, 2006, Mounier had e-mailed Jagiello: "Susan and Cindy [one of the sibling clients] are concerned about your being away. [¶] Do you want an hourly representation or a contingency or a combo? [¶] Are you comfortable with me negotiating a written agreement on your behalf? [¶] Are you comfortable with me, assuming you agree to me getting a written representation agreement, pleading and filing a complaint in your name?" Two days later, Mounier sent a letter to Christman and her two siblings advising: "Barbara Jagiello is ready to formalize your representation and authorized me to submit the attached Representation Agreement to you. [¶] . . .[¶] Please review the Agreement. If you have questions, call me. If you are ready to hire Barbara Jagiello please sign the acceptance page and fax it to me." That same day, August 4, 2006, Mounier e-mailed "Cindy and Susan" and told them: "I was unable to reach Barbara Jagiello in Croatia—she is ready to get a petition/complaint on file and authorized me to send the attached representation agreement. [¶] . . . [¶] Please review the Agreement. If you are ready to proceed, please fax your acceptance to my office [I am representing Barbara Jagiello's practice while she is overseas this month] . . . ."

Christman and Mounier submitted declarations in opposition to Jagiello's motion to disqualify. They both acknowledged that it was Mounier who brought Christman to Jagiello. Mounier had referred cases to Jagiello, and had been co-counsel in the sense that "we jointly represented the client, but were not lawyers for one another." According

to Mounier, Jagiello "has a custom of spending summers onboard her yacht in the Mediterranean." She was doing so in 2006, but she "has e-mail and internet connection on her yacht, and communicated with me from the Mediterranean."

Mounier further acknowledged that he did prepare the "form representation agreement" that "Jagiello decided to use" after Mounier "sent it to her on her yacht." According to Mounier, Jagiello returned from Europe and met with Christman and her siblings (apparently for the first time) "on Saturday or Sunday, August 6 or 7, 2006." But according to Christman, she and her siblings met Jagiello on August 4. Although at one point in his declaration Mounier stated he "was involved" in Christman's case yet was never "counsel of record" for his wife, at another point he stated "he has never represented Barbara A. Jagiello in the Susan Christman elder financial abuse litigation, and at all times was representing Susan E. Christman, only."

Jagiello filed a second declaration to reply to what she called the "fanciful" declaration by Mounier. According to Jagiello: "I was not in California on August 4, 2006 or any of the dates referenced in the Christman, Mounier declarations. As evidenced by the exhibits attached to my earlier declaration, I was not in the country during the first half of August 2006 . . . . I was not in Sacramento when the representation agreement was negotiated by Mounier and signed by the client[s]; I was 'overseas.' [¶] Exhibit E shows that John Mounier collected from Christman a check for $1,700 and that he faxed me a copy of that check to my office on August 17, 2006. Exhibit E shows that the sender of the copy of the check was John Mounier whose office fax number was . . . . So Mounier collected the one check Christman paid in the Sacramento case"

Jagiello further declared: "Mounier was intimately involved in the action for which he [*sic*] is now suing and was clearly holding himself out to me as a person who was representing my interests. He not only represented me, he represented that he was me to the court and to others when he signed my name to documents and letters." Specifically, "Mounier reviewed the billing statements which I prepared before I sent them to Christman. Mounier filed not only a complaint but a lis pendens while I was out

of the country and signed it Barbara Jagiello. On September 19 and 22, 2006, he wrote a letter to Ruth Christman and signed it 'Barbara Jagiello.' On September 11, 2006, he wrote a letter to opposing attorney and signed it 'Barbara Jagiello.' "

Jagiello concluded: "I understood that Mounier was representing me and looking out for my interests when he negotiated the Representation Agreement and collected checks which he held for me and later forwarded. I believed him when he asked: 'Are you comfortable with me negotiating a written representation agreement on *your* behalf?', and I accepted his representation of my interests and signed the agreement. I would not have allowed Mounier such license if I did not believe that he was, as he stated, representing me . . . . [¶] Because of his representation of my interests, I disclosed to him concerns in confidence about the nature of the Christman v. Christman case and discussed concerns and issues as to representation agreements. Mounier received significant compensation from my office in 2006. [¶] . . . [¶] Mounier is testifying as a witness in this case, he has brought up numerous issues about the Agreement which he cannot deny writing. In addition, he fails to explain his signatures as 'Barbara Jagiello' and how he would have such authority to sign the documents and letters if he were not acting on my behalf. From Paragraph 25 in his declaration [in which Mounier interprets the representation agreement] we know he intends, as he did, to speak for Christman taking an adverse interest to the document he drafted on my behalf. He could not have a clearer conflict of interest."

Mounier also filed a second declaration, this one stating that "I never reviewed any bills for Barbara Jagiello" and never received confidences from Jagiello about the underlying case or representation agreements.

Jagiello's motion to disqualify was heard at an unreported hearing on January 26, 2012. The court entered an order granting it, on the ground that "John Mounier's participation in the preparation of the retainer agreement and his work with it on behalf of Ms. Jagiello concerning Ms. Jagiello's proposed representation of Ms. Christman requires that Mr. Mounier be disqualified even in the absence of any showing that Ms. Jagiello communicated information in confidence to John Mounier which John

Mounier agreed, or should have understood, that it was not be disclosed to Ms. Christman." Christman filed a timely notice of appeal from the order, which is appealable. (*Machado v. Superior Court* (2007) 148 Cal.App.4th 875, 882.)

REVIEW

All the law we need is found in *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 (*SpeeDee*) and *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 (*Oasis*).

First, the standards governing our review: "Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence support the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court's discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion. [Citation.]" (*SpeeDee*, *supra*, 20 Cal.4th 1135, 1143-1144.)

Second, the principles governing disqualification: "A motion to disqualify a party's counsel may implicate several important interests. Consequently, judges must examine these motions carefully to ensure that literalism does not deny the parties substantial justice. [Citation.] Depending on the circumstances, a disqualification motion may involve such considerations as a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. [Citations.] . . .

"A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers,

and all other persons in any manner connected with a judicial proceeding before it in every matter pertaining thereto.' [Citations.] Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process. [Citations.]" (*SpeeDee*, *supra*, 20 Cal.4th 1135, 1144-1146, fn. omitted.)

We have cited these principles to illustrate the quandary into which Christman's brief places us. It is clear from the declarations submitted in connection with the motion that there were profound factual differences between the parties, getting as elemental as whether Jagiello was in the western or the eastern hemisphere in the first two weeks of August 2006. This would come as a surprise to the reader of Christman's opening brief, which cites only Mounier's declaration, as if it were the sole evidentiary source seen by the trial court. This hardly complies with the rule directing that an appellant's opening brief must: "Provide a summary of the significant facts limited to matters in the record." (Cal. Rules of Court, rule 8.204(a)(2)(C).)

The substance of the brief is no better. All the brief has is "Discussion," with a single decision cited. This scantiness cannot be seen as complying with the rule that "Each brief must: [¶] . . . [¶] State each point under a separate heading or subheading summarizing the point . . . ." (Cal. Rules of Court, rule 8.204(a)(1)(B).) This failure is not corrected by Christman's reply brief, which simply reiterates the opening brief's "Discussion" in its entirety, with the addition of a single concluding sentence. These omissions leave us with no real clue as to the precise nature of Christman's dissatisfaction with the trial court's ruling.

Jagiello's brief—which is in scrupulous compliance with the above rules—labors under the same burden, forcing Jagiello's attorney to cover far more ground than may be necessary. From our reading of it, we agree that the primary—if unstated—ground for the trial court's ruling was that Mounier was caught in a conflict of interest. The excerpt

quoted in the sole decision cited by Christman—*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197—is about disqualification for conflict of interest. Unfortunately, the concept of conflict of interest is protean in its diversity and complexity. (See Cal. Rules. Prof. Conduct, rule 3-310; *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282-283, & fn. 2.) The chapter on "Conflicts of Interest" in a leading treatise is one of the longest. (See Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2012) ch. 4.) Having examined the record, we have virtually no doubt that the particular application of the principles regarding conflicts is the one concerning successive representation of clients with adverse interests. "A member [of the State Bar] shall not, without the informed written consent of the . . . former client, accept employment adverse to the . . . former client . . . ." (Cal. Rules. Prof. Conduct, rule 3-310(E).)

An attorney owes every former client fiduciary obligations, among which are "the duties of loyalty and confidentiality, which continue[] in force even after the representation has ended. [Citation.] As we have previously explained, '[t]he effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. [Citation.] The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship.' [Citation.] Accordingly, 'an attorney is forbidden to do either of two things after severing [the] relationship with a former client. [The attorney] may not do anything which will injuriously affect [the] former client in any matter in which [the attorney] formerly represented [the client] nor may [the attorney] at any time use against [the] former client knowledge or information acquired by virtue of the previous relationship.' [Citations.]" (*Oasis, supra*, 51 Cal.4th 811, 821.) " '[T]he subsequent representation of another against a former client is forbidden not merely when the attorney *will* be called upon to use confidential information obtained in the course of the former employment, but in every case when, by reason of such subsequent employment, he *may* be called upon to use such confidential information.' " (*People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 155.)

Naturally, disqualification presumes a prior attorney-client relationship. (*Civil Service Com. v. Superior Court* (1984) 163 Cal.App.3d 70, 76-77.) Although the trial court made no express finding that Mounier had previously represent Jagiello, indulging an implied finding to this effect is clearly appropriate. And here Christman is seriously disadvantaged by failing to set out all of the relevant evidence in her opening brief. By reason of that omission, the point could be summarily resolved against her. (*Foreman & Clark Corp. v. Fallon* (1970) 3 Cal.3d 875, 881.) However, Jagiello's declarations, which we must assume were accepted by the trial court (*Kulko v. Superior Court* (1977) 19 Cal.3d 514, 519, fn. 1; *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1182), constitute substantial evidence to support the implied finding. (*SpeeDee*, *supra*, 20 Cal.4th 1135, 1143-1144.) We likewise accept an implied finding to the effect that it was Mounier who drafted the retainer agreement between Jagiello and Christman.

On the basis of these findings, there is no doubt that a conflict of interest is clearly looming. As shown by Christman's cross-complaint, the language of the retainer agreement will figure prominently in her allegations against Jagiello. As the drafter of that document, Mounier is a logical, and primary, source of percipient testimony. Thus, as shown from Jagiello's objection to paragraph 25 of Mounier's declaration, it appears fairly certain that Jagiello is justified in anticipating that Mounier " intends . . . to speak for Christman taking an adverse interest to the document he drafted on my behalf." This clearly establishes a conflict of interest warranting disqualification. (*Oasis*, *supra*, 51 Cal.4th 811, 821; *People ex rel. Deukmejian v. Brown, supra,* 29 Cal.3d 150, 155; *Brand v. 20th Century Ins. Co./21st Century Ins. Co*. (2004) 124 Cal.App.4th 594, 599, 605-607.) The trial court not having disregarded the governing legal principles, we conclude its ruling cannot be overturned as an abuse of discretion. (*SpeeDee*, *supra*, 20 Cal.4th 1135, 1143-1144.)

DISPOSITION

The order is affirmed.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.